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LIABILITY OF WATER COMPANIES FOR FIRE LOSSES —ANOTHER VIEW

IN the Superior Court of Cook County, Illinois, before Judge Arthur H. Frost, there was recently presented in substance this case: A private corporation furnishing water to a municipality for fire protection had contracted with the town, in consideration of certain fire hydrant rentals, to keep at all times a pressure of water of at least thirty-five pounds per square inch on the water pipes connected with said fire hydrants, and, in case of a fire, to increase, at once, the pressure to forty pounds per square inch. A fire occurred. It was assumed that the water company had notice of it; that the fire department arrived in time to have saved the plaintiff's house, had the pressure contracted for been furnished; that the pressure was not furnished and that the plaintiff's property was destroyed. The plaintiff sued the water company in an action sounding only in contract. The learned judge directed a verdict for the defendant. A direct appeal to the Supreme Court was dismissed for want of jurisdiction,[1] and the case is not now pending in any court.

The following is a revised report of the oral argument made by the writer before Judge Frost on behalf of the water company, upon the merits of the legal problem.[2] It is offered as a reply to the position taken by Mr. Sunderland in the last number of this REVIEW:—

The most striking feature of the water company's position is that in nineteen jurisdictions, where the exact question presented in this case has arisen in twenty-two cases, the holding has been for the

[1] Rostad *v.* Chicago Suburban Water and Light Company, 211 Ill. 248.

[2] Mr. Horace S. Oakley, of the Chicago bar, led, for the defendant, in this case. To his suggestions and interest in the construction of this argument, the writer is very greatly indebted for the results obtained.

defendant as a matter of law. These jurisdictions include Connecticut,[3] New York,[4] Pennsylvania,[5] West Virginia,[6] Tennessee,[7] Georgia,[8] Mississippi,[9] Texas,[10] Nevada,[11] Idaho,[12] California,[13] Iowa,[14] Nebraska,[15] Kansas,[16] Missouri,[17] Wisconsin,[18] Indiana,[19] Ohio,[20] and United States.[21] Of these twenty-two cases arising in these nineteen jurisdictions, sixteen[22] came up on demurrer to the declaration, petition or complaint. The plaintiff had stated his case in his own way and with all the completeness possible, setting forth with monotonous sameness just what we have in the case at bar—a contract between the water company and the municipality either to

[3] Nickerson *v.* Bridgeport Hydraulic Co., 46 Conn. 24 (1878), opinion by Park, C. J.

[4] Wainwright *v.* Queens County Water Co., 78 Hun 146, 28 N. Y. Supp. 987 (N. Y. Sup. Ct. 1894), opinion by Brown, P. J.

[5] Beck *v.* Kittanning Water Co., 11 Atl. 300 (Pa. 1887); Stone *v.* Uniontown Water Co., 4 Pa. Dist. Repts. 431 (1895).

[6] Nichol *v.* Huntington Water Co., 53 West Va. 348, 44 S. E. 290 (1903), opinion by Paffenbarger, J.

[7] Foster *v.* Lookout Water Co., 3 Lea 42 (Tenn. 1879), opinion by Cooper, J.

[8] Fowler *v.* Athens City Water Works, 83 Ga. 219, 9 S. E. R. 673 (1889), opinion by Bleckley, J. C.

[9] Wilkinson *v.* Light, Heat & Water Co., 78 Miss. 389, 28 So. 877 (Miss. 1900), opinion by Boothe (special Justice).

[10] House *v.* Houston Water Works Co., 88 Tex. 233, 28 L. R. A. 532, opinion by Brown, J.

[11] Ferris *v.* Carson Water Co., 16 Nev. 44 (1881), opinion by Belknap, J.

[12] Bush *v.* Artesian Hot & Cold Water Co., 4 Idaho 618, 43 Pac. 69 (1895), opinion by Huston, J.

[13] Town of Ukiah City *v.* Ukiah Water & Imp. Co., 75 Pac. 773 (Cal. 1904), opinion by Henshaw, J.

[14] Davis *v.* Clinton Water Works Co., 54 Ia. 59 (1890), opinion by Beck, J.; Becker *v.* Keokuk Water Works, 79 Ia. 419 (1890), opinion by Robinson, J.

[15] Eaton *v.* Fairbury Water Works Co., 37 Neb. 546 (1893), opinion by Ryan, J.

[16] Mott *v.* Cherryvale Water Co., 48 Kan. 12, 28 Pac. 989 (1892), opinion by Horton, C. J.

[17] Howsmon *v.* Trenton Water Co., 119 Mo. 304 (1893), opinion by Brace, J.

[18] Britton *v.* Green Bay Water Works, 81 Wis. 48 (1902), opinion by Orton, J.

[19] Fitch *v.* Seymour Water Co., 139 Ind. 214, 37 N. E. R. 982 (1894), opinion by Howard, J.

[20] Akron Water Works Co. *v.* Brownless, 10 Ohio Cir. Ct. Repts., 620 (1895), opinion by Caldwell, J.; Blunk *v.* Dennison Water Supply Co., 73 N. E. R. 210 (Ohio, 1905).

[21] Boston Safe-Deposit & T. Co. *v.* Salem Water Co., 94 Fed. 238 (1899), U. S. Cir. Ct., N. Dist. of Ohio.

[22] Nichol *v.* Huntington Water Co., 53 W. Va. 348, 44 S. E. R. 290 (1903); Fitch *v.* Seymour Water Co., 139 Ind. 214, 37 N. E. R. 982 (1894); Davis *v.* Clinton Water Works Co., 54 Ia. 59 (1880); Becker *v.* Keokuk Water Works, 79 Ia. 419 (1890); Bush *v.* Artesian Hot & Cold Water Co., 4 Idaho 618, 43 Pac. 69 (1895); Wilkinson *v.* Light, Heat & Water Co., 78 Miss. 389, 28 So. 877 (1900); Boston Safe Deposit & T. Co. *v.* Salem Water Co., 94 Fed. 238 (1899), U. S. Cir. Ct., N. Dist. of (Ohio); Eaton *v.* Fairbury Water Works Co., 37 Neb. 546 (1893); Ferris *v.* Carson Water Co., 16 Nev. 44 (1881); Britton *v.* Green Bay Water Works, 81 Wis. 48 (1902); Nickerson *v.* Bridgeport Hydraulic Co., 46 Conn. 24 (1878); Howsmon *v.* Trenton Water Co., 119 Mo. 304 (1893); House *v.* Houston Water Works Co., 88 Tex. 233, 28 L. R. A. 532; Foster *v.* Lookout Water Co., 3 Lea 42 (Tenn., 1879); Wainwright *v.* Queens Co. Water Co., 78 Hun. 146, 28 N. Y. Supp. 987 (N. Y. Supreme Court, 1894); Blunk v. Dennison Water Supply Co., 73 N. E. R. 210 (Ohio, 1905).

furnish a water supply at fire hydrants for fire protection, or else to furnish at the fire hydrants water at a specified pressure—that the plaintiff was a resident of the town and paid taxes or water rates—that there was a fire—that the fire company attended and could have put out the fire and saved the plaintiff's property, if the water company had fulfilled its contract with the municipality—yet in fifteen[23] of these sixteen cases the demurrer was sustained in the lower court and the case was affirmed above. In three[24] cases the court below nonsuited the plaintiff, and this was affirmed. In three cases there was a verdict for the plaintiff. In the upper court the case was in one instance reversed,[25] in the other two the order granting a new trial was affirmed.[26]

Of these twenty-two cases, arising in these nineteen jurisdictions, it is worth remark that every one went off on the *merits* of the legal controversy. With the exception of Missouri[27] perhaps, where only the right to sue in contract was considered, not one went upon the form of the action. In every case but two[28] the pleading was under a code, and it made no difference what the form of the action was, whether contract or tort, and in all of them the plaintiff failed because he had no cause of action upon any theory. In some cases the court considered both the theory of contract and of tort.[29] In some the court was indifferent to terminology.[30] In others still the court assumed that if there was any cause of action it must be in contract.[31] In Connecticut and West Virginia, the two states which

[23] All *except* Wainwright *v.* Queens Co. Water Co., 78 Hun 146, 28 N. Y. Supp. 987 (N. Y. Supreme Court, 1894).

[24] Beck *v.* Kittanning Water Co., 11 Atl. 300 (Pa., 1887); Stone *v.* Uniontown Water Co., 4 Pa., Dist. Repts. 431 (1895); Fowler *v.* Athens City Water Works, 83 Ga. 219, 9 S. E. R. 673 (1889).

[25] Akron Water Works Co. *v.* Brownless, 10 Ohio Cir. Ct. Repts. 620 (1895).

[26] Mott *v.* Cherryvale Water Co., 48 Kan. 12, 28 Pac. 989 (1892); Town of Ukiah City *v.* Ukiah Water & Imp. Co., 75 Pac. 773 (Cal., 1904).

[27] Howsmon *v.* Trenton Water Co., 119 Mo. 304 (1893).

[28] Nickerson *v.* Bridgeport Hydraulic Co., 46 Conn. 24 (1878); Nichol *v.* Huntington Water Co., 53 West Va. 348, 44 S. E. 290 (1903).

[29] Fowler *v.* Athens City Water Works, 83 Ga. 219, 9 S. E. R. 673 (1889); House *v.* Houston Water Works Co., 88 Tex. 233, 28 L. R. A. 532; Britton *v.* Green Bay Water Works, 81 Wis. 48 (1902); Fitch *v.* Seymour Water Co., 139 Ind. 214, 37 N. E. R. 982 (1894); Nickerson *v.* Bridgeport Hydraulic Co., 46 Conn. 24 (1878); Nichol *v.* Huntington Water Co., 53 West Va. 348, 44 S. E. 290 (1903).

[30] Wainwright *v.* Queens Co. Water Co., 78 Hun. 146, 28 N. Y. Supp. 987 (N. Y. Supreme Ct., 1894); Beck *v.* Kittanning Water Co., 11 Atl. 300 (Pa., 1887); Stone *v.* Unionton Water Co., 4 Pa. Dist. Repts. 431 (1895); Foster *v.* Lookout Water Co., 3 Lea 42 (Tenn., 1879); Wilkinson *v.* Light, Heat & Water Co., 78 Miss. 389, 28 So. 877 (1900); Bush *v.* Artesian Hot & Cold Water Co., 4 Idaho 618, 43 Pac. 69, (1895); Mott *v.* Cherryvale Water Co., 48 Kan. 12, 28 Pac. 989 (1892); Town of Ukiah City *v.* Ukiah Water & Imp. Co., 75 Pac. 773 (Cal., 1904).

[31] Ferris *v.* Carson Water Co., 16 Nev. 44 (1881); Davis *v.* Clinton Water Works Co., 54 Ia. 59 (1880); Becker *v.* Keokuk Water Works, 79 Ia. 419; Blunk *v.* Dennison Water Supply Co., 73 N. E. R. 210 (Ohio, 1905).

had a common law system of pleading, the action was on the case in tort for damages.[32] In both a demurrer to the declaration was sustained, the court considering whether any action lay either in contract or tort. Thus, we have a solid array of jurisdictions where the plaintiff was denied a cause of action on any ground whatsoever.

It is a further element of strength in these cases that none of them go off upon the ground that the court does not recognize any exceptions to the rule that a person not a party to a contract can not sue upon it. On the contrary, all are decided, either explicitly or tacitly, upon the assumption that every recognized exception to that rule is in force. Sometimes the application of recognized exceptions is directly dealt with.[33] Some of the cases, for instance, for the sake of argument, admit the general right of any beneficiary to sue upon the contract.[34] An independent examination of the law of each jurisdiction where the water cases referred to are decided shows that in every one, except, perhaps, Pennsylvania[35] and Connecticut,[36] the exception, now known in all the books and reports as the doctrine of *Lawrence* v. *Fox,* was in force,[37] and in ten[38] of the jurisdictions, by decision or by statute, the rule that a person not a party to the contract may sue if he be the sole beneficiary of it was recognized. These two constitute the only known and definite exceptions to the rule that a person not a party to a contract cannot sue on it. It is not possible, then, to distinguish the cases for the defendant on the ground that the jurisdictions where they were decided did not recognize the exceptions which permit third persons in some cases to sue upon contracts to which they were not parties.

Mention is made on behalf of the plaintiff of a Kentucky case,

[32] Nickerson *v.* Bridgeport Hydraulic Co., 46 Conn. 24 (1878); Nichol *v.* Huntington Water Co., 53 West Va. 348, 44 S. E. 290 (1903).

[33] Howsmon *v.* Trenton Water Co., 119 Mo. 304 (1893); Ferris *v.* Carson Water Co., 16 Nev. 44 (1881); Eaton *v.* Fairbury Water Works Co., 37 Neb. 546 (1893); Davis *v.* Clinton Water Works Co., 54 Ia. 59 (1880); Blunk *v.* Dennison Water Supply Co., 73 N. E. R. 210 (Ohio, 1905).

[34] Wilkinson *v.* Light, Heat & Water Co., 78 Miss. 389, 28 So. 877 (1900); Howsmon *v.* Trenton Water Co., 119 Mo. 304 (1893); Blunk *v.* Dennison Water Supply Co., 73 N. E. R. 210 (Ohio, 1905).

[35] See "Contracts for the Benefit of a Third Person," by Samuel Williston, 15 *Harvard Law Review,* 767, at p. 807, Note 2, citations from Pa.

[36] Morgan *v.* Randolph Co., 73 Conn. 396 (1900). Observe, however, that at about the time the Conn. water case (Nickerson *v.* Bridgeport Hydraulic Co., 46 Conn. 24) was decided there was a strong *dictum* in Meech *v.* Ensign, 49 Conn. 191, in favor of the doctrine of Lawrence *v.* Fox.

[37] "Contracts for the Benefit of a Third Person," by Samuel Williston, 15 *Harvard Law Review,* 767, at p. 805, Note 2, cases following Lawrence *v.* Fox collected.

[38] Penn., Ga., Nev., Neb., Kas., Mo., Wis., Ind., Ohio, and W. Va. "Contracts for the Benefit of a Third Person," by Samuel Williston, 15 *Harvard Law Review,* 767, at p. 804, Note 1, cases sustaining the sole beneficiary's right to recover collected.

decided in 1889,[39] and a North Carolina case, decided in 1899,[40] where the plaintiff's position was sustained. It is a still further element of strength in the defendant's cases that out of eleven of them, decided since the Kentucky case, eight carefully consider the Kentucky case and either squarely repudiate it[41] or distinguish it[42] on the ground that there was in that case a private contract between the water company and the plaintiff lumber company to furnish water for fire protection to fire hydrants belonging to the plaintiff and upon the plaintiff's own premises.[43] Two cases cited[44] on behalf of the water company, decided since the North Carolina case, both repudiate it.

So much then for the simple mass of illustrative cases. As was said, however, in the North Carolina case,[45] decisions from other jurisdictions "are to be weighed, not counted." What, then, are the reasons upon which these cases go? The answer to this is very simple. So far as an action in contract is concerned, only one line of reasoning is possible. The plaintiff is suing upon a contract to which he is not a party. To succeed he must bring himself within some recognized exception to the general rule,[46] that a person not a party to a contract cannot sue upon it. Now, there are only two possible exceptions for him to rely upon. From these he is in fact

[39] Paducah Lumber Co. *v.* Paducah Water Supply Co., 89 Ky. 340.

[40] Gorrell *v.* Greensboro Water Co., 124 N. C. 328.

[41] Britton *v.* Green Bay Water Works, 81 Wis. 48, 58 (1892); Howsmon *v.* Trenton Water Co., 119 Mo. 304, 315 (1893); House *v.* Houston Water Works Co., 88 Tex. 233, 240; Fitch *v.* Seymour Water Co., 139 Ind. 214, 220; 37 N. E. 982, 984 (1894).

[42] Mott *v.* Cherryvale Water Co., 48 Kan. 12, 16, 28 Pac. 989, 990 (1892); Town of Ukiah City *v.* Ukiah Water & Imp. Co., 75 Pac. 773, 775 (Cal., 1904); Boston Safe Deposit & T. Co. *v.* Salem Water Co., 94 Fed. 238, 240 (1899, Cir. Ct. N. Dist. of Ohio); Eaton *v.* Fairbury Water Works Co., 37 Neb. 546, 552-554 (1893); Bush *v.* Artesian Hot & Cold Water Co., 4 Idaho 618, 621, 43 Pac. 69, 70 (1895).

[43] There is no doubt that under such circumstances the plaintiff has a right to recover: New Orleans Co. *v.* Meridian Water Works Co., 72 Fed. 227; Middlesex Water Co. *v.* Knappman Whiting Co., 45 Atl. 692 (N. J. Eq. & App.), 49 L. R. A. 572 (cited by plaintiff); Town of Ukiah City *v.* Ukiah Water & Imp. Co., 75 Pac. 773, 775, *semble*.

[44] Nichol *v.* Huntington Water Co., 53 West Va. 348, 44 S. E. 290 (1903); Town of Ukiah City *v.* Ukiah Water & Imp. Co., 75 Pac. 773 (Cal., 1904).

[45] Gorrell *v.* Greensboro Water Co., 124 N. C. 328, 335 (1899).

[46] Harriman on Contracts, 2nd Ed., 210. For the most extreme extent to which this general rule is recognized see the decisions in the following jurisdictions:

England: Price *v.* Easton, 4 B. & Ad. 433; Tweddle *v.* Atkinson, 1 B. & S. 393; Pollock on Contracts, 2nd Ed., 200, 201; 7th Ed., pp. 211-213.

Massachusetts: Exchange Bank *v.* Rice, 107 Mass. 37 (1871); Borden *v.* Boardman, 157 Mass. 410 (1892); Marston *v.* Bigelow, 150 Mass. 45; Saunders *v.* Saunders, 154 Mass. 337; Terry *v.* Brightman, 132 Mass. 318.

New Hampshire: Butterfield *v.* Hartshorn, 7 N. H. 345; Warren *v.* Batchelder, 15 N. H. 129.

Connecticut: Morgan *v.* Randolph Co., 73 Conn. 396.

Michigan: Halsted *v.* Francis, 31 Mich. 113; Wheeler *v.* Stewart, 94 Mich. 445; Linneman *v.* Moross Estate, 98 Mich. 178.

excluded upon the soundest reasoning. The first is the doctrine of *Lawrence* v. *Fox*[47]—the second, the sole beneficiary theory.

The doctrine of *Lawrence* v. *Fox* cannot, it is believed, aid the plaintiff.

To the transaction involved in that case there were three parties—the promisor, the promisee, and the payee. The promisor promised the promisee to pay the promisee's debt to the payee.[48] It was held that the payee might sue the promisor in his own name on the contract. This decision is law in every state of the Union (including Illinois,[49]) except Massachusetts,[50] New Hampshire,[51] Vermont,[52] Connecticut[53] and Michigan.[54] Oregon,[55] and Pennsylvania[56] seem doubtful. Observe that in *Lawrence* v. *Fox* the relation of debtor and creditor existed between the promisee and the payee. The promisor agreed to pay the promisee's debt to the payee. Subsequent cases in New York have made the existence of this relation a condition precedent to the payee's right to recover.

(1892) *Durnherr* v. *Rau*, 135 N. Y. 219: In that case Durnherr, the husband, conveyed to Rau. Durnherr's wife reserved dower. Rau promised the husband to discharge all encumbrances upon the land. This he did not do and the wife's dower was lost by foreclosure. The wife thereupon sued Rau for the breach of his promise to her husband. It was held she could not recover. The court said "there is lacking in this case the essential relation of debtor and creditor between the mortgagor and a third person seeking to enforce such covenant, or such a relation as makes the performance of the covenant at the instance of such third person a satisfaction of some legal or equitable duty owing by the grantor which must exist according to the cases in order to entitle a stranger to the covenant to enforce it. * * * The husband, however, owes her [the wife] no duty enforcible in law or equity to pay the mortgages to relieve her dower."[57]

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[47] Lawrence *v.* Fox, 20 N. Y. 268 (1859).

[48] In that case the defendant (the promisor) who received $300 from the promisee, Holly, promised in consideration thereof to pay this sum to the plaintiff (the payee) the next day. The said Holly, the promisee, was indebted in that sum to the plaintiff, the payee.

[49] "Contracts for the Benefit of a Third Person," by Samuel Williston, 15 *Harvard Law Review*, 767, at p. 805, Note 2. Citation of Illinois cases. See also cases cited *post*, Note 73.

[50] *Supra*, Note 46.

[51] *Supra*, Note 46.

[52] *Supra*, Note 46.

[53] *Supra*, Note 46.

[54] *Supra*, Note 46.

[55] "Contracts for the Benefit of a Third Person," by Samuel Williston, 15 *Harvard Law Review*, 767, at p. 807. (Oregon citations).

[56] "Contracts for the Benefit of a Third Person," by Samuel Williston, 15 *Harvard Law Review*, 767, at p. 807. (Pennsylvania citations).

[57] See also in *accord*, Townsend *v.* Rackham, 143 N. Y. 516; Presbyterian Church *v.* Cooper, 112 N. Y. 517.

It must be at once apparent, then, that the plaintiffs in these water cases could not recover under the doctrine of *Lawrence* v. *Fox*, because no relation of debtor and creditor existed between the municipality (the promisee) and the plaintiff. The city or town was in no wise liable to the inhabitants for failure to protect them from fire by negligently failing to furnish a water supply for fire protection.[58] That is because protection from fire is one of the city's discretionary or legislative functions only.[59]

One of the most frequent points presented in these water cases, in denying the plaintiff's right to recover, is the fact that if the city ran the water works it would not be liable for damages occurring because of negligence in failing to supply water.[60] It is clear now that the logical force of this fact is to exclude the application of the doctrine of *Lawrence* v. *Fox*. It is significant that in several of the water cases it was pointed out specifically that the plaintiff could not bring himself within the doctrine of *Lawrence* v. *Fox*, because the city or town was under no legal duty or liability to the inhabitant:

(1893) *Howsmon* v. *Trenton Water Co.*, 119 Mo. 304: This was one of the water cases on all fours with the case at bar. A demurrer to the petition below was sustained, and this was affirmed. Speaking of the doctrine of *Lawrence* v. *Fox* the court (by BRACE, J.) says (quoting from the later New York case of *Vrooman* v. *Turner*, 69 N. Y. 280): "In every case in which an action has been sustained there has been a debt or duty owing by the promisee to the party claiming to sue upon the promise." Then the Missouri court proceeds as follows, p. 309: "An examination of very many cases decided before and since it was so held in that case, satisfies us that the rule has been confined to such cases in this State as well as elsewhere, and upon that prin-

[58] Wheeler *v.* Cincinnati, 19 Ohio St. 19 (1869); Hayes *v.* City of Oshkosh, 33 Wis. 314 (1873); Tainter *v.* Worcester, 123 Mass. 311 (1877); Springfield Fire Ins. Co. *v.* Keesville, 148 N. Y. 46 (1895); Wright *v.* Augusta, 78 Ga. 241 (1886); Van Horn *v.* Des Moines, 63 Ia. 447 (1884); Grant *v.* City of Erie, 69 Pa. 420 (1871); Edgerley *v.* Concord, 62 N. H. 8 (1882); Jewett *v.* New Haven, 38 Conn. 368 (1871); Torbush *v.* City of Norwich, 38 Conn. 225 (1871); Wilcox *v.* City of Chicago, 107 Ill. 334; Nichol *v.* Huntington Water Co., 53 West Va. 348, 44 S. E. 290 (1903), at pp. 291, 292, *semble;* Wainwright *v.* Queens Co. Water Co., 78 Hun. 146, 28 N. Y. Supp. 987, 991 (N. Y. Supreme Ct., 1894), *semble;* Foster *v.* Lookout Water Co., 3 Lea 42, 49 (Tenn., 1879), *semble;* Town of Ukiah City *v.* Ukiah Water & Imp. Co., 75 Pac. 773, 775 (Cal., 1904), *semble.*

Even the cases holding that the *plaintiff* can recover admit that the municipality is not liable under similar circumstances. Graves Co. Water Co. *v.* Ligon, 66 S. W. Rep. 725, 726; Gorrell *v.* Greensboro Water Supply Co., 124 N. C. 328, 336; Planters' Oil Mill *v.* Monroe Water Works, 52 La. Annual 1243.

[59] This was aptly put by Judge Caldwell in the Ohio case: Akron Water Works Co. *v.* Brownless, 10 Ohio Cir. Ct. Repts. 620, 626 (1895).

[60] Boston Safe Deposit & T. Company *v.* Salem Water Co., 94 Fed. 238, 241 (1899, U. S. Cir. Ct., N. Dist. of Ohio); Eaton *v.* Fairbury Water Works Co., 37 Neb. 546, 559 (1893); House *v.* Houston Water Works Co., 88 Tex. 233, 248; Mott *v.* Cherryvale Water Co., 48 Kan. 12, 28 Pac. 989, 990 (1892).

ciple, when this case was before the Kansas City Court of Appeals * * * it was, in effect, held that the plaintiff had no cause of action against the water company because the town of Trenton was under no obligation to the plaintiff to furnish an adequate supply of water and power, to extinguish the fire by which the premises were consumed." And again the court (pp. 313 to 314) puts the matter even more plainly: "Although it was within the power of the town by contract to supply water for the purpose of extinguishing fires, it did not owe the duty of extinguishing fires to the plaintiff. (*Heller* v. *Sedalia*, 53 Mo. 159.) Consequently the case is not brought within the line of adjudicated cases which maintain an exception to the rule that suit upon a contract must be brought by a party to the contract in cases where the promisee owed a duty to the third party, which the promisor undertook to perform."[61]

It is not believed that the sole beneficiary theory can aid the plaintiff's case.

Where *Lawrence* v. *Fox* applies the promisor promises the promisee to pay the promisee's debt to the payee. In that case there are two beneficiaries of the promise—the promisee, for his debt to the payee is to be discharged, and the payee, since he receives payment of what is due him. The sole beneficiary theory has no application, therefore, to that state of facts. It applies only when the payee is in fact the *sole* beneficiary of the promise—when the promisee pays a consideration for the promisor's undertaking for the payee in which the promisee has no beneficial interest whatsoever.[62]

The plaintiff in the case at bar is not the sole beneficiary of the water company's promise. In the first place, the plaintiff is a beneficiary only as one of ten thousand other inhabitants.[63] Even if all of the inhabitants of the town be considered collectively as one beneficiary, yet it is clear that the town is also a beneficiary, and, in fact, the chief beneficiary. The water is furnished to it—that is, to its fire department. The Town is the one that actually uses the water. The inhabitant, therefore, is certainly not the *sole* beneficiary.

Furthermore, the sole beneficiary theory does not apply in this State [Illinois] unless the payee be a blood relation of the promisor or promisee. This was the rule upon which a third party could sue under the English cases as they stood in the latter half of the seven-

[61] See also to the same effect, Ferris *v.* Carson Water Co., 16 Nev. 44, 47 (1881); Eaton *v.* Fairbury Water Works Co., 37 Neb. 546, 550 (1893); Blunk *v.* Dennison Water Supply Co., 73 N. E. R. 210 (Ohio, 1905).

[62] Nat. Bank *v.* Grand Lodge, 98 U. S. 123.

[63] Davis *v.* Clinton Water Works Co., 54 Ia. 59, 60: The court after saying that "the sole beneficiary of a contract may maintain an action to recover property or money to which he is entitled thereunder" went on to say that this case did not fall within the exception. "The plaintiff received benefits from the water thus supplied in common with all the people of the city. These benefits she receives just as she does other benefits from the municipal government, as the benefits enjoyed on account of improved streets, peace and order enforced by police regulations, and the like."

teenth century.[64] In the middle of the nineteenth century these cases were entirely repudiated in England,[65] and lately Massachusetts[66] and Michigan[67] have refused to follow them. Recently, however, the rule was adopted by the New York Court of Appeals.[68]

Until the recent case of *Lawrence* v. *Oglesby*[69] the Supreme Court of Illinois had never gone further in the application of a general principle than the doctrine of *Lawrence* v. *Fox*. This is a sweeping statement, but it is based upon the examination of every case which has been found decided either in the Supreme Court or in the Appellate courts of this State, dealing with the general rights of a person not a party to a contract to sue upon it.

The cases where the third party was allowed to sue may be summed up as follows: 1st. There are insurance cases, viz.: cases where one other than the person purchasing the insurance is a beneficiary under a life insurance policy, or where a mortgagor purchases fire insurance payable to the trustee in a trust deed or to the mortgagee.[70] The results reached in these insurance cases are, however, regarded in all jurisdictions as peculiar to the law of insurance contracts. From them no general principles can be drawn as to the rights in general of persons not parties to contracts to sue upon them. The holding that the trustee in a trust deed may sue the insurance company on a policy obtained by the mortgagor and made payable to the trustee may even proceed upon the doctrine of *Lawrence* v. *Fox,* since the promise by the insurance company is substantially an agreement on certain contingencies to pay a certain portion of the mortgagor's debt to the mortgagee or the trustee as the representative of the holder of the notes. 2d. Where the plaintiff, by mutual agreement of all parties, finishes the original promisee's contract with the promisor he can recover from the promisor. This result proceeds either on the ground that there has been a novation by mutual consent or that a new contract has been made between the plaintiff and defendant.[71] 3d. In *American Splane Co.* v. *Barber* (cited for plaintiff)[72] the promisor had actually received $1,000 direct from the plaintiff, and it was clearly a part of the terms upon which that sum was received that, in the event which had

[64] Bourne *v.* Mason, 1 Vent. 6 (1669); Dutton *v.* Poole, 2 Lev. 210 (1677).

[65] Tweddle *v.* Atkinson, 1 B. & S. 393 (1861); Pollock on Contracts, 2nd Ed. (1888), 200, 201, 7th Ed. (1902), 211-213.

[66] Marston *v.* Bigelow, 150 Mass. 45; Saunders *v.* Saunders, 154 Mass. 337.

[67] Linneman *v.* Moross Estate, 98 Mich. 178.

[68] Buchanan *v.* Tilden, 158 N. Y. 109; Everdele *v.* Hill, 58 N. Y. Sup. 447.

[69] 178 Ill. 122.

[70] Hartford Fire Ins. Co. *v.* Olcott, 97 Ill. 439.

[71] Dunshee *v.* Hill, 20 Ill. 499. See also Knisely *v.* Brown, 95 Ill. App. 516.

[72] 194 Ill. 171.

happened, the sum was to be refunded. That promise was made not only to the plaintiff's husband in the formal contract under seal, but also to herself direct. There was, therefore, nothing to prevent her maintaining a suit upon the common counts. 4th. Every other case in this State which has been found, including all those cited for the plaintiff not already referred to, were such as the doctrine of *Lawrence* v. *Fox* was exactly applicable to.[73]

One case only has been found among all those examined in the reports of this State which is supportable upon no known principle. It is *Dean* v. *Walker*.[74] There the first mortgagor conveyed his equity of redemption subject to the mortgage, and the transferee afterwards conveyed to the defendant, who assumed to pay the mortgage. It is clear that the mortgagee was not the sole beneficiary of this promise since the mortgagor was equally a beneficiary. It is clear that the doctrine of *Lawrence* v. *Fox* did not apply, because the first assignee, who was the promisee, was not the debtor of the mortgagee. In New York, where the real scope of *Lawrence* v. *Fox* was clearly understood, it was held that the mortgagee could not sue the second assignee who had assumed the mortgage where the first assignee had not so assumed it.[75] Yet in *Dean* v. *Walker* he

[73] Eddy *v.* Roberts, 17 Ill. 505, 508, *semble* (cited by plaintiff); Brown *v.* Strait, 19 Ill. 88; Bristow *v.* Lane, 21 Ill. 194 (cited by plaintiff); Rabberman *v.* Wiskamp, 54 Ill. 179; Ball *v.* Benjamin, 56 Ill. 105; Wilson *v.* Bevans, 58 Ill. 232; Beasley *v.* Webster, 64 Ill. 458; Steele *v.* Clark, 77 Ill. 471, 474 (cited by plaintiff); Snell *v.* Ives, 85 Ill. 279 (cited by plaintiff); Walden *v.* Karr, 88 Ill. 49; Thompson *v.* Dearborn, 107 Ill. 87; Shober *v.* Kerting, 107 Ill. 344; Daub *v.* Englebach, 109 Ill. 267; Bay *v.* Williams, 112 Ill. 91 (cited by plaintiff); Schmidt *v.* Glade, 126 Ill. 485; Ingram *v.* Ingram, 172 Ill. 287; Commercial Nat. Bk. *v.* Kirkwood, 172 Ill. 563 (cited by plaintiff); Webster *v.* Fleming, 178 Ill. 140 (cited by plaintiff); Cobb *v.* Heron, 180 Ill. 49; Cotes *v.* Bennett, 183 Ill. 82; Harts *v.* Emery, 184 Ill. 560; Watkins *v.* Sands, 4 Ill. Ap. 207; Mathers *v.* Carter, 7 Ill. Ap. 225; Strubel *v.* Hake, 14 Ill. Ap. 546; Hume *v.* Brower, 25 Ill. Ap. 130; Boals *v.* Nixon, 26 Ill. Ap. 517; Williamson-Stewart Paper Co. *v.* Seaman, 29 Ill. Ap. 68; McCasland *v.* Doorley, 47 Ill. Ap. 513; Way *v.* Roth, 58 Ill. Ap. 198; Rothermel *v.* Bell & Zoller Co., 79 Ill. Ap. 667; Wickham *v.* Hyde Park Bldg. Assn., 80 Ill. Ap. 523; Kee *v.* Cahill, 86 Ill. Ap. 561; Knisely *v.* Brown, 95 Ill. Ap. 516.

[74] 107 Ill. 540.

[75] Vrooman *v.* Turner, 69 N. Y. 280. See also the following cases to the same effect, cited by Mr. Williston in his article on "Contracts for the Benefit of a Third Person," 15 *Harvard Law Review*, 767, 791, Note 1: Ward *v.* De Oca, 120 Cal. 102; Morris *v.* Mix, 4 Kan. App. 654; Brown *v.* Stillman, 43 Minn. 126; Nelson *v.* Rogers, 47 Minn. 103; Crone *v.* Stinde, 68 Mo. App. 122 (reversed); Hicks *v.* Hamilton, 144 Mo. 495 (overruled); Harberg *v.* Arnold, 78 Mo. App. 237 (overruled); Wise *v.* Fuller, 29 N. J. Eq. 257, 266; Norwood *v.* Hart, 30 N. J. Eq. 412; Mount *v.* Van Ness, 33 N. J. Eq. 262, 265; Eakin *v.* Shultz, 47 At. Rep. 274 (N. J. Eq.); King *v.* Whitely, 10 Paige, 465; Trotter *v.* Hughes, 12 N. Y. 74; Smith *v.* Cross, 16 Hun. 487; Young Men's Assoc. *v.* Croft, 34 Ore. 106; Portland Trust Co. *v.* Nunn, 34 Ore. 166; Osborne *v.* Cabell, 77 Va. 462, *semble*. On the other hand it is held in New York consistently with the doctrine of Lawrence *v.* Fox, that if the first assignee of the mortgaged property assumes and agrees to pay the mortgage and the second assignee does likewise, then the mortgagee may sue the second assignee directly. Gifford *v.* Corrigan, 117 N. Y. 257. See also the following

was allowed to sue. The scope of *Lawrence* v. *Fox* and the general principles of the right of a third party to sue on contracts were not noticed. Other jurisdictions have held the same way,[76] and doubtless the holding is now law in this State, but it is believed that it stands by itself as a result which may, perhaps, be followed, but which does not announce any broader rule than that laid down in *Lawrence* v. *Fox* or the sole beneficiary theory.

On the other hand, the cases where the third party was not allowed to maintain his suit tend very strongly to indicate that, prior to the decision in *Lawrence* v. *Oglesby* at least, the third party could sue only in a case brought within the rule of *Lawrence* v. *Fox*. In *Crandall* v. *Payne*[77] we find the Supreme Court denying to the sole beneficiary, who was not, however, a blood relation to either the promisor or the promisee, the right to sue on the contract of the defendant to pay him $1,000. This was later modified by *Lawrence* v. *Oglesby*. In that case our Supreme Court went back to the older English cases,[78] as did the New York court in *Buchanan* v. *Tilden*,[79] and held that the sole beneficiary might sue when he was a blood relation of the promisor or promisee.[80]

It is needless to say that any qualification of the sole beneficiary theory such as that announced in *Lawrence* v. *Oglesby*, excludes its application in favor of the plaintiff in this case.

There is a broader reason than any yet given why the plaintiff cannot bring himself within the doctrine of *Lawrence* v. *Fox* or the sole beneficiary theory, or, in fact, within any theory upon which a person not a party to a contract can sue upon it. The plaintiff is not, properly speaking, a beneficiary at all.

A distinction must be taken between a direct beneficiary who may

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cases cited by Mr. Williston in his article on "Contracts for the Benefit of a Third Person," 15 *Harvard Law Review*, 767, 790, Note 1: Flint *v.* Cadenasso, 64 Cal. 83; Rick *v.* Hoffman, 69 Ind. 137; Carnahan *v.* Tousey, 93 Ind. 561; Corning *v.* Burton, 102 Mich. 86.

[76] See cases cited by Samuel Williston in his article on "Contracts for the Benefit of a Third Person," 15 *Harvard Law Review*, 767, 791, Note 1: Cobb *v.* Fishel, 62 Pac. Rep. 625 (Col. App.); Marblebank *v.* Mesarvey, 101 Ia. 285; Heim *v.* Vogel, 69 Mo. 529; Crone *v.* Stinde, 156 Mo. 262; Hare *v.* Murphy, 45 Neb. 809; Brewer v. Maurer, 38 O. St. 543; Merriman *v.* Moore, 90 Pa. 78; McKay *v.* Ward, 20 Utah, 149; Enos *v.* Sanger, 96 Wis. 150.

[77] 154 Ill. 627.

[78] *Supra*, Note 64.

[79] *Supra*, Note 68.

[80] This rule will sustain the holding in Hager *v.* Phillips, 14 Ill. 260. To the declaration in a suit by a sole beneficiary a demurrer was sustained on the ground that the contract under which the plaintiff claimed was under seal. Since Webster *v.* Fleming, 178 Ill. 140, this ground for sustaining the demurrer would no longer be sound, but the earlier case may still be supported under the rule of Lawrence *v.* Oglesby that the sole beneficiary cannot sue unless he is a blood relation of the promisor or promisee.

sue, and one only incidentally benefited who cannot sue[81]—the test of who is a direct beneficiary and who is not, is this: Is the promised performance to be executed directly to the third party? If it be payment of the promisee's debt, as in *Lawrence* v. *Fox,* is the money to be handed over to the third party directly? If not, then the third party is not a beneficiary and cannot sue upon any theory. Thus, if the promise is to put money into the promisee's hands, with which he is to pay his debts, the creditor cannot sue; or if the promise is to pay the promisee $1,000, conditioned, however, to be void if the promisor pays the promisee's debt to a third party, the creditor cannot sue. This distinction has been clearly recognized in the cases at large:

(1869) *Turk* v. *Ridge,* 41 N. Y. 201: Here the promisor gave to the promisee a bond promising to pay to the promisee a certain penal sum. The bond was conditioned to be void if the promisor paid the promisee's debt to C. It was held that C could not sue. The performance actually promised according to the form of the bond was not promised to be carried out directly to C, it was merely to pay the penal sum to the promisee.[82]

(1898) *Thomas* v. *Prather,* 65 Ark. 27: Here an employer contracted with an employee "to furnish medical attendance." The employee hired his own doctor, who was the plaintiff, but the defendant knew about it and approved the choice. The doctor sued the employer for his services and judgment for the plaintiff was reversed upon the ground that the doctor could not be said to be a beneficiary in any proper sense. "The most that can be said about it so far as any physician was concerned, is that upon the happening of the contingency which it contemplated,—the accidental injury,—the performance of the contract would result incidentally to his benefit. This would not entitle him to sue the company."

(1887) *Burton* v. *Larkin,* 36 Kan. 246: B agreed to furnish C such sums as might be necessary to pay C's current expenses, C to render to B monthly accounts of his expenses. It was held that one who furnished C goods could not sue B. This went upon the ground that the contract was solely between B and C and that nothing was promised to be paid or given to the plaintiff,—in short, that the performance did not run to the plaintiff. On page 250 VALENTINE, J., said: "Indeed the contract is solely between B and C and solely for the benefit of these two persons, and not for the benefit of any other person or class of persons. Of course this contract, if everything was to occur as contemplated, might incidentally result to the benefit of others than B and C. So might also almost any contract result to the benefit of others than the parties thereto, and yet no cause of action in favor of third persons and against

[81] (1895) Mr. JUSTICE BAKER in Crandall *v.* Payne, 154 Ill. 627: "It would be going too far to hold that a mere stranger to the contract, who was to derive only an incidental benefit therefrom, might recover for a breach of such contract."

[82] Simson *v.* Brown, 68 N. Y. 355, is practically the same case and the same holding.

one of the parties to the contract could be founded upon any such indirect results."

In the case at bar it is too obvious that the promise of the water company was to furnish water or pressure, not to the inhabitants, but to the municipality. No water ever went to the plaintiff. It always went to the fire department to be used by it, and no one else. The performance by the water company never touched the plaintiff. The contract was executed when the pressure and water were delivered at the mouth of the hydrant to the Town. How, then, was this performance carried out directly to the plaintiff in the slightest degree? In order that this plaintiff should be a beneficiary in any proper sense of the word, the contract here should have been with the Town to furnish water pressure for fire purposes to the inhabitants at their *own* fire hydrants. It is no wonder, then, that the water cases cited for the defendant were decided upon the ground that the plaintiff was not a beneficiary at all, more regularly than upon any other:

(1892) ORTON, J., in *Britton* v. *Green Bay Water Works,* 81 Wis. 48, 56: "Here the company has not promised or contracted to perform the obligations of its contract to the plaintiff or to any other one except the city, the other contracting party."

(1878) PARK, C. J., in *Nickerson* v. *Bridgeport Hydraulic Co.,* 46 Conn. 24, 29: "Had the plaintiff's fire been extinguished it would have been by the fire department; for there is no allegation in the count that the plaintiffs had hose that might have been attached to the hydrants and the fire extinguished by their own efforts. Hence, whatever benefits the plaintiffs could have derived from the water would have come from the city through its fire department. The most that can be said is, that the defendants were under obligation to the city to supply the hydrants with water."[83]

(1895) BROWN, J., in *House* v. *Houston Water Works Co.,* 88 Tex. 233, 239: "It is true that plaintiffs in error might have received benefit from the performance of the contract by the defendant, but 'it is not every promise made from one to another, from the performance of which a benefit may inure to a third, which will give a right of action to such third person, he being neither privy to the contract nor to the consideration. The contract must be made for his benefit as its *object,* and he must be the party intended to be benefited.' *Simson* v. *Brown,* 68 N. Y. 355; *Burton* v. *Larkin,* 36 Kan. 246; *Wright* v. *Terry,* 23 Fla. 169. * * * In this case, the contract does not embrace the plaintiffs either by name or by mentioning a class to which they

[83] This passage is cited with approval in Howsmon *v.* Trenton Water Co., 119 Mo. 304 (1893); House *v.* Houston Water Works Co., 88 Tex. 233; Foster *v.* Lookout Water Co., 3 Lea 42 (Tenn.).

belong; it was not made for the purpose of benefiting them or a class to which they belong. The object and purpose of making the contract was to keep water in the mains which the city might apply to use in the public fountains, by flushing the gutters, or in extinguishing fires in case a conflagration should occur. If a fire occurred, and if plaintiff's property should be involved, and if the fire company should arrive in time, they might be benefited by the performance of the contract. Such benefit would be incidental, however, not flowing immediately from the performance of the contract."

(1893) BRACE, J., in *Howsmon* v. *Trenton Water Co.*, 119 Mo. 304, 314: "The benefits to be conferred upon the individual citizen by the contract is incidental to the contract, the primary object of which is the benefit of all the citizens in their corporate capacity."[84]

(1905) SHAUCK, J., in *Blunk* v. *Dennison Water Supply Co.*, 73 N. E. R. 210, 211 (Ohio), in holding that the demurrer of the water company was properly sustained to the plaintiff's petition, said: "If a stranger to a contract were held entitled to secure the benefits which might incidentally result to him from its performance, not only would an established rule of law be violated, but parties entering into contracts could not determine the extent of their obligations nor the numbers of those to whom they might be incurred."

The city fire department needs many things to make it effective—fire engines, horses, hose, alarms, as well as a water supply. It might manufacture its engines, hose and alarms, raise its own horses, and furnish its own water supply. As a matter of fact it usually purchases the engines, horses, hose and alarms, and frequently the water supply as well. All these items stand on the same footing precisely. All of them are actually used by the city itself in the course of running its fire department, all of them are necessary to render the protection given by the fire department effective. The water is not more important than the hose. Do those who contend that the water company is liable to the inhabitant assert that such inhabitant can sue for damages caused by a defective hose, or engine? If so, where will they stop? If one contract with a city to build, in a certain time, a bridge over a river within its boundaries, of great public necessity, and he should fail to do so within the time fixed, would each one of the inhabitants who had suffered some appreciable damage in consequence of the delay have an action

[84] See also the following water cases containing language to the effect that the plaintiff in this line of cases is not a beneficiary at all in any proper sense of the word: Wainwright *v.* Queens Co. Water Co., 78 Hun. 146, 28 N. Y. Supp. 987 (N. Y. Supreme Ct., 1894); Ferris *v.* Carson Water Co., 16 Nev. 44, 47 (1881); Nichol *v.* Huntington Water Co., 53 West Va. 348, 44 S. E. 290, 293 (1903); Fitch *v.* Seymour Water Co., 139 Ind. 214, 37 N. E. 982, 984 (1894); Wilkinson *v.* Light, Heat & Water Co., 78 Miss. 389, 28 So. 877, 878 (1900).

against him? Who, under such a doctrine, could ever be safe in making a contract to do anything which affected large numbers of persons beneficially?[86] The Texas[87] and New York[88] courts have pointed out that the right of an inhabitant to sue the manufacturer who sold the city fire department a defective hose and fire engine could not be countenanced. The Wisconsin court[89] was equally emphatic that nowhere would it be held that the bridge builder was liable. None of these cases differ in principle from the one at bar. In all cases where the Town contracts for fire engines, hose, horses, alarms, and water, it is simply purchasing necessary supplies to make its fire department effective. The things purchased are for use by the city fire department and by it alone. The performance is direct to the city by the water company. The city is the sole and only beneficiary. The inhabitant is simply affected beneficially by the general equipment of the city's fire department.

It is believed that the recent California case[90] furnishes a striking illustration of the fact that these contracts to furnish water to the city for fire protection are merely supply contracts for the necessary equipment of the fire department. There the municipality's own buildings were destroyed by fire and the water company failed to furnish the water contracted for. It was nevertheless held that the city could not recover for the loss of the buildings. Why? Because the contract was simply one for necessary supplies for the general use of the fire department. The damages suffered, therefore, for which the city could recover were those which the fire department suffered by not having the water when wanted, just as its damages for a defective horse bought might be the consideration paid for the horse and not the value of a city hall which burned because the horse fell dead in its tracks on the way to the fire.

The result in the California case seems very violent. So do all these water cases when the inhabitant is not allowed to sue. It is believed that it is the violent and dramatic consequences of the failure by the water company that overpowers the judgment and obscures the fact that so far as the inhabitant is concerned there is simply a failure in the equipment of the city fire department which makes that department ineffective. The city is not liable for any failure in its equipment, not even if it be negligent, and there is no relation between the inhabitant and the water company.

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[86] Blunk *v.* Dennison Water Supply Co., 73 N. E. R. 210 (Ohio, 1905).

[87] House *v.* Houston Water Works Co., 88 Tex. 233, 247.

[88] Wainwright *v.* Queens Co. Water Co., 78 Hun. 146, 28 N. Y. Supp. 987, 992 (N. Y. Supreme Ct. 1894).

[89] Orton, J., in Britton *v.* Green Bay Water Works, 81 Wis. 48, 57.

[90] Town of Ukiah City *v.* Ukiah Water & Impr. Co., 75 Pac. 773 (Cal., 1904).

The plaintiff can make no headway against this line of authority and these reasons in support of it.

Several grounds upon which the plaintiff might rely have been tried and found wanting. The argument that the municipality is the agent of the inhabitants and has made a contract for them as principals has been met and found unsound.[91] The fact that the plaintiff is a tax payer has been held to be no ground for liability.[92] The mere fact that the defendant is a water company organized to supply water is no basis for the plaintiff's action.[93]

The plaintiff's cases in point are of very doubtful value. As to the North Carolina case,[94] that can have no place as an authority in this suit, even though it be regarded as rightly decided, because, as it was subsequently held, the recovery in that case was based upon an action sounding in tort not contract.[95] The court in the Louisiana case[96] reached a result favorable to the plaintiff with a good deal of doubt, and finally rested its conclusion wholly upon the several provisions of the Louisiana Code which describes what third parties interested in the performance of contracts may sue upon them. The original Kentucky case, *Paducah Lumber Co.* v. *Paducah Water Co.*, was, as has been observed, very weak because the case came up on demurrer to a petition, and the petition alleged that private hydrants had been placed upon the premises of the plaintiff for the express use of the plaintiff, and that a special contract had been entered into between the defendant water company and the plaintiff in regard to furnishing fire pressure at those hydrants. On such a state of facts there is no doubt of the plaintiff's right to recover.[98]

It looks a little as if the Kentucky court itself had, at one time at least, become doubtful about the propriety of the *Paducah* case, for, while the later cases in Kentucky have gone the whole length of the *dictum* in the *Paducah* case,[99] yet in one of the more recent of them

[91] House *v.* Houston Water Works Co., 88 Tex. 233, 239: "The city of Houston did represent its citizens in making the contract just as governments represent the people in every official act, but in no other sense." See also Howsmon *v.* Trenton Water Co., 119 Mo. 304, 314 (1893).

[92] Howsmon *v.* Trenton Water Co., 119 Mo. 304, 314 (1893); Becker *v.* Keokuk Water Works, 79 Ia. 419, 421; Mott *v.* Cherryvale Water Co., 48 Kan. 12, 28 Pac. 989, 990 (1892); Eaton *v.* Fairbury Water Works, 37 Neb. 546, 558 (1893).

[93] Nickerson *v.* Bridgeport Hydraulic Co., 46 Conn. 24, 27 (1878); Town of Ukiah City *v.* Ukiah Water & Imp. Co., 75 Pac. 773, 774 (Cal., 1904).

[94] Gorrell *v.* Greensboro Water Co., 124 N. C. 328 (1899).

[95] Fisher *v.* Greensboro Water Co., 128 N. C. 375 (1901); Guardian Trust Co. *v.* Greensboro Water Co., 115 Fed. 184 (U. S. Cir. Ct., N. C., 1902).

[96] Planters' Oil Mill *v.* Monroe Water Works, 52 La. Ann. 1243.

[98] New Orleans Co. *v.* Meridian Water Works Co., 72 Fed. 227. See *supra*, Note 43.

[99] Lexington Hydraulic Co. *v.* Oots, 84 S. W. R. 774 (Ky., 1905); Graves County Water Co. *v.* Ligon, 112 Ky. 775, 66 S. W. R. 725 (1902); Duncan *v.* Owensboro Water Co., 12 S. W. R. 557 (Ky., 1889).

it is hinted that it would not do to upset the previous ruling because such a course would disturb (and especially in that case) the operation of contracts entered into after the *Paducah* case was decided.[100] Upon exactly the same reasoning the result in the case at bar ought to be against the plaintiff, for when the contract of 1889 involved in this suit was entered into, the original Kentucky case had not yet been decided.[101] On the other hand, in every State where the question had come up, the holding had been against the plaintiff[102] upon the soundest reasoning.

The only point relevant to the discussion not already touched upon —the legal straw which has proved sufficient to buoy up the result in the North Carolina case, and which is the last hope of the plaintiff —is the *reductio ad absurdum* argument. It will be said: the city can only get nominal damages for this breach of contract. Therefore if the plaintiff here cannot sue practically nobody can. There is no remedy in the law for this breach of contract. Such a result is a hardship on the plaintiff and a reflection upon the law.[103]

There is much less force in this position than might at first appear. It is true there may be no remedy by a suit for damages against the water company, but who will doubt that the city might have a suit in equity for a mandatory injunction to enforce specifically the performance of its contract? It may also protect itself by conditions forfeiting the water company's hydrant-rentals, or even its franchises. It has even been held that the failure to furnish water for fire protection is a sufficient ground for the rescission of the contract, even in the absence of express conditions:

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[100] Graves Co. Water Co. *v.* Ligon, 66 S. W. R. 725, 726 (Ky.). The court said: "The cases above referred to were decided by this court in the year 1899, or two years before the contract now before us was made. The rule then three times announced by this court was recognized as the law of the State at the time the contract before us was made, and we must presume that the parties to the contract contracted with reference to the law as it had been then declared by this court. To give a different effect now to the words which they used from that which they at that time understood was the legal operation of the contract would be to make for them a contract different from that which they themselves made; for when they used words which, under the law that had then been declared, created a certain obligation, it must be presumed that they intended to create the obligation."

[101] The opinion in the Paducah case was handed down December 5, 1889. The date of the most recent contract involved in this suit was May 25, 1889.

[102] Nickerson *v.* Bridgeport Hydraulic Co., 46 Conn. 24 (1878); Davis *v.* Clinton Water Works Co., 54 Ia. 59 (1880); Ferris *v.* Carson Water Co., 16 Nev. 44 (1881); Fowler *v.* Athens City Water Works, 9 S. E. R. 673, 83 Ga. 219 (1889); Foster *v.* Lookout Water Co., 3 Lea 42 (Tenn., 1879).

[103] Suggestion of Judge Freeman in his annotations to 29 Am. St. Repts., p. 863. Judge Freeman's suggestion was acted upon in Gorrell *v.* Greensboro Water Co., 124 N. C. 328, 336-337, and later in Graves County Water Co. *v.* Ligon, 60 S. W. R. 725, 726 (Ky.).

(1895) *Light, Heat & Water Co. of Jackson* v. *City of Jackson,* 73 Miss. 598, 19 So. Rep. 771: The city of Jackson filed a bill against the water company to rescind a contract of the water company because of its failure to fulfil its contract to furnish fire pressure "when necessary for fire protection." The defendant's demurrer to the bill was overruled and this was sustained. The court, by COOPER, C. J., in sustaining the right of the city to rescind said (p. 646): "The remedy of rescission, while one which the courts are reluctant to afford when adequate damages for a breach of contract may be recovered at law, is particularly appropriate in cases of this character. What the city contracted for was a constant supply of water for the protection of the property of its citizens against fire. A failure to afford such supply would result in no injury if no fire occurred; but to say that, because no damage has been sustained, no right, either of an action at law, or in equity for rescission, can be maintained, would hazard the security of the inhabitants, and leave without sufficient remedy the perpetuation of the very danger to avoid which large outlays of public money have been made for years."[104]

The plaintiff's argument then forces him into this position: If you enter into a contract with A, which A may enforce specifically in equity, or the breach of which A may make the basis of rescission or forfeiture of valuable rights, but for which the promisee cannot recover certain damages which may result to a stranger from the breach, you shall be liable to that stranger or any other stranger in a similar situation. Was there ever a more monstrous exception to a general rule? Simply because, upon the breach of a contract, the promisee gets only nominal damages, the whole world that may be substantially affected is let in to sue.

It is not true that there is any particular hardship upon the plaintiff because he could not sue the municipality if it had run the water works. So far from its being a hardship upon him that he cannot sue, it would rather be an extra privilege if he could.

(1892) ORTON, J., *Britton* v. *Green Bay Water Co.,* 81 Wis. 48, 58: "Is it a hardship that the plaintiff cannot recover in such a case? So it is in case the city is sued for the neglect of its duty in not furnishing the necessary machinery for putting out fires. It is no greater hardship in one case than in the other."

(1903) POFFENBARGER, J., *Nichol* v. *Huntington Water Co.,* 53 West Va. 348, 356: "The answer to this [*reductio ad absurdum* argument as advanced by Judge FREEMAN] is that although the property owner has not a right of action against the water works company for his damages, he is in no worse condition than he would be if the protection of his property were entrusted to the city, exercising its police power itself, and not through a water works company as an agent or instrumentality in its hands."

[104] Farmer's Loan & Trust Co. *v.* Galesburg, 133 U. S. 156 *accord.*

A decision for the water company in the case at bar, so far from being a reflection upon the law, is in accordance with the law's soundest principles. Any other result would unsettle the whole law of contracts and introduce something new and anomalous into that law. The language of the learned judge in the Wisconsin case should not be forgotten:

(1892) ORTON, J., in *Britton* v. *Green Bay Water Co.*, 81 Wis. 48, 58-59: After holding in this case (which was on all fours with the case at bar), that the plaintiff had no cause of action upon any theory, the learned judge concluded: "This court has no disposition or tendency to engraft new, strange and radical principles on the body of our well established law, under the false guise of progress to meet the spirit of the age. Principles which reason has established and long experience has sanctioned are very apt to be the best that legislative and judicial wisdom can devise and the safest criterion of judicial action."

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